NO. 83040-1

SUPREME COURT OF THE STATE OF WASHINGTON

LEE H. ROUSSO,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

STATE OF WASHINGTON'S RESPONSE TO AMICI

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The State responds as follows to the *Amicus Curiae* brief of the Poker Players Alliance ("PPA") and the *Amici Curiae* brief of Cheryl and John Blake, Rob Esene and Jim Gauley.

I. ARGUMENT

The question before the Court is whether Washington's prohibition against Internet gambling, contained in RCW 9.46.240, is constitutional under the United States Constitution's Commerce Clause, or more specifically, the "dormant" Commerce Clause.[1] A statute is presumed constitutional. *State v. Heckel*, 143 Wn.2d 824, 832, 24 P.3d 404 (2001). A party that challenges the constitutionality of a statute "bears the burden of proving it unconstitutional beyond a reasonable doubt." *Id.*

A. Washington's Prohibition Against The Knowing Transmission Or Receipt Of Gambling Information Does Not Discriminate Against Interstate Commerce.

When evaluating a statute under the dormant Commerce Clause, a reviewing court must first determine whether the statute discriminates against interstate commerce either facially or by effect. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984); *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 110, 63 P.2d 779 (2003). A statute that does not discriminate is valid unless the

[1] RCW 9.46.240 prohibits the knowing transmission or receipt of "gambling information" through any electronic communication medium, including the Internet. Therefore, this statute is applicable to all gambling information, not merely gambling information relating to the game of poker.

burden imposed on interstate commerce is "*clearly* excessive" in relation to the putative local benefits. *Pike v. Bruce Church,* 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). The burden to establish discrimination rests on Rousso, the party challenging the constitutionality of RCW 9.46.240. *See Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979).

Amicus curiae PPA attacks RCW 9.46.240 by claiming that the statute has a discriminatory effect. Specifically, *Amicus* contends that the statute favors in-state economic interests over out-of-state interests and, by doing so, "protects against out-of-state competition for the identical service."[2] PPA Br. at 6. The argument advanced by *Amicus* is without merit because "brick-and-mortar" card rooms are not similarly situated to Internet gambling, which includes online casinos, bookmaking operations, and Websites modeled on poker.[3]

In assessing whether a statute has a discriminatory effect, it is necessary to compare the statute's impact on "substantially similar" or "similarly situated" entities. *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, 313, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997). *Amicus* appears to contend that brick-and-mortar card rooms are similarly situated to

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[2] The Court of Appeals correctly rejected Rousso's argument that RCW 9.46.240 favors local businesses by protecting Washington's licensed card rooms from competition on the Internet. *Rousso*, 149 Wn. App. at 358.

[3] Internet gambling is currently illegal under federal law and in all 50 states.

Internet poker sites simply because they allegedly offer or provide "the identical service." PPA Br. at 6. *Amicus*, however, does not offer any support for its conclusion that in-person gambling in a brick-and-mortar establishment is identical to gambling online.

Courts have looked to a variety of factors to determine whether entities are similarly situated for purposes of the dormant Commerce Clause, including analyzing business structure, product marketing and delivery, and market competition. Entities are not similarly situated merely because they compete in the same market with the same products. *See Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 527 (9th Cir. 2009) ("Because states may legitimately distinguish between business structures in a retail market, a business entity's structure is a material characteristic for determining if entities are similarly situated."). Entities with different business structures or marketing methods are not similarly situated, even if they compete in the same market for the same customers. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163-64 (5th Cir. 2007) (independent auto body shop and insurance company-owned auto body shop are different business forms and not similarly situated); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 125-27, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) (out-of-state gasoline refiners who also operated retail

stations and in-state gasoline retailers have different business structures and are not similarly situated).

Although online gambling activities are modeled on in-person gambling, brick-and-mortar card rooms and Internet poker sites offer very different services and experiences based on the manner in which the services are delivered. For example, brick-and-mortar card rooms require that the consumer play the traditional game of poker through direct physical interaction with other human beings, while Internet gambling sites offer the consumer an opportunity to play an online game modeled on poker in a solitary, virtual world, with no direct human interaction required.

For purposes of determining the impact of RCW 9.46.240 on substantially similar entities, the counterparts of out-of-state Internet gambling sites are not in-state brick-and-mortar card rooms. Rather, they are, or would be, in-state Internet gambling sites. *See Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 215-216 (2nd Cir. 2003) (holding that the "Plaintiffs' in-state counterparts are not New York brick-and-mortar retail outlets that sell cigarettes; rather they are non-brick-and-mortar sellers who ship cigarettes directly to New York consumers following purchases made by Internet, telephone, or mail order."); *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 500

(5th Cir. 2001) ("The [Supreme] Court's jurisprudence finds discrimination only when a State discriminates among similarly situated in-state and out-of-state interests."). Therefore, comparing the impact of the statute's prohibition on in-state brick-and-mortar card rooms with the statute's impact on Internet casinos is inapposite as the two entities are not substantially similar.

A comparison of the effect that RCW 9.46.240 has on entities that are actually similarly situated reveals that the statute is non-discriminatory, as it regulates Internet gambling in an even-handed way and does not protect in-state interests. *See Heckel*, 143 Wn.2d at 833 (holding that law providing that "no person" shall send proscribed commercial email to a computer located in Washington is not facially discriminatory because it has equal application to both in-state and out-of-state persons); *see also Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir.), *cert. denied*, 513 U.S. 918 (1994) ("An import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items). RCW 9.46.240 prohibits all knowing transmission or receipt of gambling information over the Internet in the State of Washington, regardless of whether the conduct occurs in intrastate or interstate commerce. The prohibition applies equally to

transmissions of gambling information between in-state residents or businesses, and between in-state residents or businesses and out-of-state or foreign residents or businesses. *See Rousso v. State*, 149 Wn. App. 344, 358, 204 P.3d 243 (2009). Moreover, RCW 9.46.240 does not prohibit out-of-state ownership of lawfully permitted gambling businesses in Washington, and it does not limit the access of Washington consumers to lawful, regulated gambling activities. Because RCW 9.46.240 regulates Internet gambling in a non-discriminatory and even-handed manner, it does not trigger heightened scrutiny under the dormant Commerce Clause.

B. The State's Legitimate Interest In Regulating Internet Gambling Does Not Unduly Burden Interstate Commerce.

RCW 9.46.240 not only survives the first level of dormant Commerce Clause inquiry, as it does not discriminate against interstate commerce either facially or by effect, but it also satisfies the second level of inquiry under *Pike*. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142.

The burden imposed on interstate commerce by RCW 9.46.240 is minimal, as it is only enforceable against individuals acting with a

sufficient nexus to Washington. Enforcement of the statute is necessarily limited by the constitutional requirements for personal jurisdiction articulated in *International Shoe v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Accordingly, Washington's ban on Internet gambling does not affect any interstate commerce that does not have a nexus to this State.

In contrast, the State's legitimate interest in prohibiting Internet gambling is great. Internet gambling, like other types of unregulated gambling activities, poses a significant risk to the health, welfare and morals of Washington residents. *See* Suppl. Br. of Respondent at 8-12 for specific discussion of the State's interest in regulation. Moreover, Internet gambling poses regulatory challenges and risks that are not present in the strictly regulated and controlled brick-and-mortar gambling operations that are legal in Washington State.

Ultimately, *Amici* contend that Washington could and should regulate, rather than prohibit, Internet gambling, and they advance a number of policy arguments. Specifically, they suggest various regulations that the State could implement in order to permit Internet gambling. They also point to other foreign jurisdictions' liberal regulation of Internet gambling to support their position that Internet gambling

should be allowed. Their arguments fail to meet their heavy burden of demonstrating that the statute is unconstitutional.

1. *Amici's* policy arguments do not support overturning Washington's prohibition on Internet gambling.

Washington's prohibition against transmitting gambling information over any form of electronic medium, including the Internet, is a policy decision made by Washington's people and legislature. *See* RCW 9.46.240; Laws of 2006, ch. 290, § 1. As this Court has recognized, such policy preferences are determined by the Legislature and expressed through statutory provisions. *American Home Assur. Co. v. Cohen*, 124 Wn.2d 865, 875, 881 P.2d 1001 (1994). Courts, therefore will not inquire into the virtues of a particular public policy preference outside the context of a constitutional analysis. *See, e.g. Louthan v. King County*, 94 Wn.2d 422, 427, 617 P.2d 977 (1980) ("The wisdom of the King County plan is not for the consideration of this court – its constitutionality is."); *Darrin v. Gould*, 85 Wn.2d 859, 893, 540 P.2d 882 (1975) ("[E]vidence supporting a public policy contrary to that contained in constitutional and statutory mandate cannot be allowed to override such a mandate"); *see also Northwest Greyhound Kennel Ass'n v. State*, 8 Wn. App. 314, 321, 506 P.2d 878 (1973), *review denied* 82 Wn.2d 1004 (1973) (legitimacy of greyhound racing was a legislative policy question concerning "how wide

the door should be opened to professional gambling" and thus not a justiciable controversy for the court).

Contrary to *Amici's* assertions, there is no reason for this Court to look beyond the constitutional question before it and inquire into the policy question of whether Internet gambling *should* be permitted and regulated, rather than prohibited. As found by the court of appeals below, and discussed above, Washington's prohibition on Internet gambling survives constitutional scrutiny. The purpose of RCW 9.46.240 is not to favor in-state economic interests. Instead, the law protects the people of the State from the social, economic, and political harm that stems from Internet gambling that is incapable of being adequately regulated. Furthermore, the State's interest in prohibiting illegal gambling outweighs any Internet gambler's interest in playing a modified, digital representation of poker online. Inquiry beyond those points is simply delving into a policy choice that has already been made by the people of this State.

2. *Amici's* reference to proposed regulations or foreign jurisdictions' acquiescence to Internet gambling does not establish that Washington could comprehensively regulate Internet gambling.

Even if this Court were to consider the policy argument that Washington *should* permit Internet gambling, reference to other

jurisdictions' proposals to permit Internet gambling or other foreign countries does not support the conclusion that this State *could* legally or effectively regulate Internet gambling.

First, as indicated by the State in previous briefing, the Wire Act, 18 U.S.C. § 1084, the Travel Act, 18 U.S.C. § 1952, and the Unlawful Internet Gambling Enforcement Act (UIGEA), 31 U.S.C. § 5361 et seq., each prohibit certain forms of Internet gambling. *See* Suppl. Br. of Respondent at 11-19 for specific discussion of the laws. Taken together, these federal acts prohibit the transmission of gambling information across state lines. In addition, the fundamental premise behind these federal acts is that the transmission of Internet gambling information can be illegal under *both* federal and state law. *See* 31 U.S.C. § 5362(10)(a) (defining unlawful Internet gambling under "any applicable Federal *or State law*") (emphasis added). These statutes indicate that, even if it chose to do so, it is doubtful Washington could legalize and regulate Internet gambling that remains illegal under federal law.[4]

[4] If it were not illegal in the United States, then there would be no purpose for the three proposed federal bills referenced by *Amici* that purport to create a regulatory scheme for online gambling. Similarly it is for this reason, among others, that no state currently authorizes online gambling. (While Nevada has a statute that ostensibly permits solely *intrastate* online gambling if certain regulations are adopted, such regulations have never been promulgated or approved and, accordingly, the law has never been implemented. *See* Nev. Rev. Stat. 463.750 (2009)).

Second, in several instances, *Amici* confuse the distinction between existing law that prohibits Internet gambling and theoretical laws that would regulate Internet gambling. For instance, *Amici* challenge the State's position that regulatory safeguards cannot be effectively enforced against an Internet gambling site. *See* Suppl. Br. of Respondent at 11 (citing the *Keller* article). They argue that the *Keller* article concludes that existing laws regarding gambling could be effectively applied online. What *Amici* fail to account for, however, is the fact that the existing gambling laws discussed in the *Keller* article *prohibit* Internet gambling, they do not *regulate* it. *See* Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 Yale L. J. 1569, 1577-84, 1607-08 (1999).

The State has reasonably recognized that regulating Internet gambling is not currently feasible and has, therefore, determined that outright prohibition is the only manner by which the State can adequately protect the public. Contrary to *Amici's* speculation, the licensing and regulatory system in Washington that currently governs in-state casinos and card rooms cannot be applied to Internet businesses in the same manner and with the same level of scrutiny. Any argument that Washington could implement background checks, audits, age verification and accounting requirements for Internet gambling sites, both offshore and

otherwise, in a manner similar to that imposed on in-state gambling establishments is, at best, simply theoretical.[5] This is true for several reasons. For example, a regulatory system depends, in part, on the cooperation and compliance of the company. It is easier to detect fraud, unscrupulous operations, or other criminal behavior in an establishment that is physically present within the State than it is on a Website located somewhere in the virtual world. In the boundless realm of the Internet, adequate state licensure and regulation of every Internet gambling site would be impossible.

Finally, it is for these same reasons that *Amici's* references to foreign jurisdictions' regulatory schemes permitting Internet gambling are unpersuasive. While jurisdictions such as the Isle of Man, France, Italy, etc., may allow Internet gambling to be provided by entities that voluntarily chose to locate, be licensed, be taxed, and operate within those jurisdictions' physical borders, they have not demonstrated any effective ability to regulate or prohibit the vast majority of Internet gambling sites that continue to stream illegal Internet gambling into their jurisdictions from foreign locales. Even as those countries open their doors to those

[5] *Amici*'s analogy to Advance Deposit Wagering (ADW) in the horseracing context is equally unpersuasive. Parimutuel wagering has long been distinguished from gambling. *See* RCW 9.46.0237. Furthermore, firms providing ADW services must be tied to an entity physically located in Washington State and only Washington residents may participate. *See* WAC 260-49-020.

Internet gambling sites that are willing to voluntarily subject themselves to regulatory processes and taxes, they remain unable to effectively deter illegal extra-jurisdictional gambling Websites that simply choose not to comply with their regulations. Nothing about the policy choices or regulatory schemes of those countries suggests a basis for overturning this State's policy choice to prohibit Internet gambling. *Amici's* invitation for this Court to engage in a detailed comparative analysis of foreign law is simply inappropriate.

C. Congress Has Authorized States To Regulate Internet Gambling.

Finally, analysis of RCW 9.46.240 under the dormant Commerce Clause remains legally unnecessary, as the statute is removed from its reach based upon a clear congressional intent to allow such state regulation. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984).[6] When Congress authorizes state

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[6] In *Wunnicke*, the U.S. Supreme Court stated that "on those occasions in which consent has been found, congressional intent and policy to insulate state legislation from Commerce Clause attack have been "expressly stated." However, the Court went on to clarify that

> [t]here is no talismanic significance to the phrase 'expressly stated,' however; it merely states one way of meeting the requirement that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine.

Wunnicke, 467 U.S. at 91-2.

laws, such laws "are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc., v. Board of Governors*, 472 U.S. 159, 174, 105 S. Ct. 2545, 86 L. Ed. 2d 112 (1985). Moreover, Congress has criminally proscribed Internet gambling and, therefore, determined that the interstate commerce relating to Internet gambling is not in the national interest. Accordingly, it does not offend the purpose of the Commerce Clause for states to discriminate or burden that illegal commerce. *Pic-A-State PA, Inc. v. Pennsylvania (Pic-A-State I)*, 42 F.3d 175, 179-80 (3rd Cir. 1994), *cert. denied*, 517 U.S. 1246 (1996).

Amicus PPA suggests that Congress' recognition that the regulation of gambling is a matter of local concern is incompatible with a congressional proscription of Internet gambling. However, to reconcile these concepts, one need only look to federal statutes that have been used to supplement and complement state gambling laws in order to ensure that wrongdoers cannot use state and international borders to evade criminal liability. The federal government has used numerous criminal laws for the stated purpose of enhancing state gambling regulations and assisting with their enforcement, including the Wire Act, the Travel Act, and the UIGEA. Taken together, these laws prohibit the transmission of gambling

information across state lines, effectively outlawing interstate Internet gambling.[7]

Without any analysis, *Amicus* concludes that the Wire Act, the Travel Act and the UIGEA do not reflect clear congressional intent to allow state regulation that burdens interstate commerce in the area of Internet gambling. Similarly, *Amicus* summarily concludes that there is no "parallel state and federal criminalization of specific conduct." PPA Br. at 19. In support of these assertions, *Amicus* cites only to the opinion of the court of appeals in this case. *Id.* However, the State's Supplemental Brief clearly sets forth argument and authority to support a conclusion different from that reached by the court of appeals below. *See* Suppl. Br. of Respondent at 13-20.

II. CONCLUSION

For the foregoing reasons, as well as for the reasons elaborated upon in Respondent's Supplemental Brief, this Court should uphold the

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[7] *See* Suppl. Br. of Respondent at 11-19 for detailed discussion of these federal laws.

validity of RCW 9.46.240 and affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 17th day of May, 2010.

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